

# STATE OF INDIANA



INDIANA UTILITY REGULATORY COMMISSION  
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**IN THE COMMISSION'S INVESTIGATION OF THE  
RATES AND CHARGES FOR ELECTRIC SERVICE  
PROVIDED BY NORTHERN INDIANA PUBLIC  
SERVICE COMPANY PURSUANT TO INDIANA CODE  
8-1-2-1 ET SEQ. INCLUDING, BUT NOT LIMITED TO,  
I.C. 8-1-2-42.5, 8-1-2-58, 8-1-2-59, 8-1-2-73.  
RESPONDENT: NORTHERN INDIANA PUBLIC  
SERVICE COMPANY, INC.**

) **FILED**  
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)  
) **SEP 10 2003**  
)  
) INDIANA UTILITY  
) REGULATORY COMMISSION  
) **CAUSE NO. 41746-S1**

You are hereby notified that on this date, the Indiana Utility Regulatory Commission ("Commission") has caused the following entry to be made:

On July 2, 2003, the Commission issued its Order in this Cause. On July 22, 2003, the Fourteen Individual Intervenors ("FII") filed a Petition for Reconsideration. On August 1, 2003, Citizens Action Coalition of Indiana, Inc. ("CAC") filed a Verified Motion for a Stay of Commission Order of July 2, 2003 Pending Further Ruling of Court on Appeal After Acquiring Jurisdiction and Response by Citizens Action Coalition of Indiana Inc. to Petition for Reconsideration of Fourteen Individual Intervenors. Also, on August 1, 2003, the Indiana Office of Utility Consumer Counselor ("OUCC") filed their Response to Individual Intervenor's Petition for Reconsideration. On August 11, 2003, the FII filed a Reply in Support of Petition for Reconsideration. Also on August 11, 2003, the NIPSCO Industrial Group filed their Opposition to CAC's Motion for Stay Pending Appeal. On August 21, 2003, the CAC filed a Verified Reply to NIPSCO Industrial Group's Opposition to CAC's Motion for Stay Pending Further Ruling by the Court of Appeals. On August 22, 2003, the NIPSCO Industrial Group filed their Motion for Leave to File Surreply in Opposition to CAC's Motion for Stay and Surreply in Opposition to CAC's Motion for Stay Pending Appeal. Said filings are incorporated herein by reference.

The Petition for Reconsideration states that no party to this proceeding challenged the reasonableness of the award of attorneys' fees, litigation expenses and costs to the Industrial Group. The FII also requests the Commission to institute a new S2 subdocket for the purpose of considering the merits of any petition for fees, costs and expenses arising from or associated with Cause No. 41746 sought by any non-signatory to the Settlement Agreement approved in that Cause. The FII also request that the Commission find that the accrued credits applied by NIPSCO pursuant to the Settlement Agreement in Cause No. 41746, through the time of the hearing in this subdocket on March 10, 2003, constituted a common fund of approximately \$35 million and that the award provided for in the Supplemental Settlement between the Industrial Group and the OUCC is reasonable in light of that existing common fund.

The CAC's Motion for Stay states that unless the FII Petition for Reconsideration results in an order on reconsideration acceptable to CAC, it will prosecute an appeal of the July 2, 2003 Order. The

CAC states that on appeal, it will challenge the Commission's award to the Industrial Group; not with regard to the reasonableness but to the Commission's legal authority to make the award under the "common fund" doctrine, absent the findings and the opportunity to seek similar awards for non-signatories to the Settlement being sought by FII in its Petition for Reconsideration. The CAC states that if it prevails on appeal, the award of attorneys' fees would be vacated pending further proceedings on remand. Then, depending on the further proceedings, the Industrial Group may be awarded fees, or the funds could revert to NIPSCO for payment to its customers, in accordance with the Commission's Order in Cause No. 41746, September 23, 2002. Therefore, the CAC states that the Commission should grant a stay of the July 2, 2003 Order to assure no premature distribution to the Industrial Group is made, but only until such time as the Court on Appeal acquires jurisdiction and has the opportunity to reconsider the issue pursuant to Appellate Rule 18.

The OUCC states that it objects to the FII request that the Commission clarify that the award to the Industrial Group was being made from a common fund, as opposed to a common benefit. The OUCC also objects to the request that the Commission find that the accrued credits of approximately \$35 million constitutes a common fund. The OUCC states that the award to the Industrial Group is predicated on the language of the Settlement Agreement approved by the Commission in Cause 41746, and whether or not a "common fund" exists is not relevant to this subdocket.

The presiding officers, being sufficiently advised in the premises, now find as follows:

A review of the Petition for Reconsideration demonstrates that it is more in the nature of a request for clarification and to establish a subdocket. The Petition for Reconsideration does not request that we reconsider our award of fees to the Industrial Group. Therefore, we treat the Petition for Reconsideration as a clarification request. First, the request for the establishment of a subdocket should be filed as a separate stand alone petition. We initiated this subdocket upon a petition from the Industrial Group. It is not appropriate to entertain the request under a Petition for Reconsideration to be decided in a post order summary fashion. The evidentiary record in this subdocket is closed. This is the first time the request was brought before us. If the FII desire to petition for attorneys' fees and expenses resulting from work performed in Cause No. 41746, they should do so and other interested parties will have an opportunity to state and argue their positions at an appropriate time.

Further, with regard to the request that we should find that there is a common fund in the amount of approximately \$35 million, the record in this Cause is devoid of such evidence. The Industrial Group filed its Verified Motion for Award of Attorney Fees requesting this Commission to approve the Supplemental Settlement Agreement between the Industrial Group and the OUCC, in accordance with Paragraph 8 of the Settlement Agreement in Cause 41746, which established the escrow account. Our July 2, 2003 Order found that request to be reasonable and authorized the payment of fees to the Industrial Group from the escrow account. The Industrial Group evidence in this subdocket referenced both the common fund and the "lodestar" methodology. Both the references in the Order were utilized by this Commission in its July 2, 2003 Order as checks on the reasonableness of the requested award. The concept of a common fund was not intended to form the basis for the award of fees but was simply illustrative of the precedent of allowing the recovery of

such fees. Therefore, we deny the request to expand the record in this Cause to find that a common fund exists.

In its Verified Motion for Stay, the CAC states that it does not challenge the reasonableness of the amount of fees requested in this Cause. There was no testimony submitted in this Cause to the contrary. Therefore, the appropriateness of the amount awarded is not in controversy. CAC's arguments do not justify a delay in the award of fees that all agree are reasonable. The customer credits have been flowing to the ratepayers in accordance with the Settlement provisions in Cause No. 41746. The escrow amount was deducted from the first year credits. By the terms of that Settlement, NIPSCO will not seek recovery of those sums even if the Commission Order is reversed on appeal. Therefore, the benefits already accrued are sufficient to justify the award. The request that we find the common benefit is the amount that has been credited to ratepayers supports this conclusion. CAC does not require a stay of the award of fees to protect its interests. As we stated in our July 2, 2003 Order, these arguments are a challenge to the Settlement Agreement itself and do not belong in this subdocket. The CAC appeal of the Settlement Agreement and Order approving it in Cause 41746 is already fully briefed and awaiting decision. CAC's issues in this subdocket are identical to the issues already briefed at the Appeals Court.

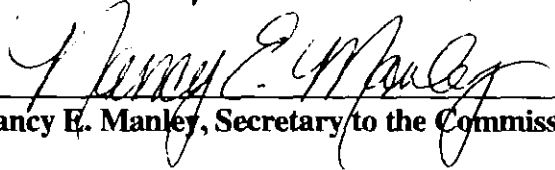
The main issues of both the FII and CAC are that they are entitled to receive fees. That issue is separate and distinct from the reasonableness of the award of attorney fees already approved in this Cause. As previously stated, we have no such pending Petition. For all the foregoing reasons, we find that the Motion for Stay should be denied.

**IT IS SO ORDERED.**

  
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David E. Ziegner, Commissioner

  
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Abby R. Gray, Administrative Law Judge

Dated: September 18, 2003

  
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Nancy E. Manley, Secretary to the Commission